No. 20299

In the United States Court of Appeals for the Ninth Circuit

METLOX MANUFACTURING COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Metlox Manufacturing Company, for review of an order of the National Labor Relations Board, issued against it on July 12, 1965, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The relevant statutory provisions are reprinted *infra,* pp. 25-26. In its answer the Board requests enforcement of its order. The Board's decision and order (R. 36-52, 62-63)[1] are reported at 153 NLRB

[1] References to the formal documents reproduced as "Volume I, Pleadings," are designated "R." References to portions of the

No. 124. This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, the unfair labor practices having occurred in Manhattan Beach, California, where the Company, a California corporation, is engaged in the manufacture of ceramic dinnerware. No issue is presented as to the Board's jurisdiction.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Company failed to meet the bargaining requirements of Section 8(a)(5) of the Act, by first refusing to bargain with the certified representative of its employees, International Brotherhood of Operative Potters, AFL-CIO, hereafter called the Union, and then, following execution of a settlement agreement, by failing adequately to substantiate its claim of financial inability to grant a wage increase or other economic benefits as requested by the Union. The facts upon which the Board based its findings may be summarized as follows:

A. *Background: the Union is certified; the Company refuses to bargain; then agrees to bargain in good faith in settlement of unfair labor practice charges.*

Following a Board conducted election, the Union was certified on June 11, 1963, as exclusive collective bargaining representative of the Company's production and maintenance employees (R. 37). On June 13,

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stenographic transcript reproduced pursuant to Court Rules 10 and 17, are designated "Tr." References to the General Counsel's Exhibits are designated "G.C. Ex."

1963, William Rail, vice president of the Union, wrote to company President E. K. Shaw requesting a bargaining meeting. This request was refused. On September 5, 1963, Alfred Klein, attorney for the Union, wrote to Peter Irwin, an attorney for the Company, again requesting that petitioner enter into contract negotiations. There was no response to this request, so on September 17, 1963, the Union filed an unfair labor practice charge with the Board (R. 3). The Company and Union settled that case by an agreement approved by the Board's Regional Director on October 29, 1963. The agreement provided that the Company would in the future bargain collectively with the Union in accordance with the requirements of the Act (R. 48).

B. *The Company claims inability to pay a wage increase and imposes conditions on a union audit of its books.*

On November 18, 1963, Mrs. Edwin Selvin, a labor relations consultant representing the Company, met with representatives of the Union for the first time. At this meeting, the Union submitted proposals which included a request for a wage increase of 35 cents an hour and "some additional cost items" such as an increase in the number of paid holidays (R. 38; G.C. Ex. 2(b), pp. 23-24). At the second meeting on November 29, Mrs. Selvin stated, "[W]e are going to have to reject not only the wage increase but all of the cost items" (R. 38-39; G. C. Ex. 2(b), p. 25). The Union asked Mrs. Selvin whether she was claiming inability to pay; she answered, "That is right, and I am willing to prove it" (G.C. Ex. 2(b), p. 86). "We can't come

here and lie to you . . . our books tell the story. The union doesn't know it; I don't know it, but our books know it . . ." (G.C. Ex. 2(b), p. 46). Going further, Mrs. Selvin explained to the members of the union bargaining committee, most of whom were rank-and-file employees of petitioner, "when I make a claim that we are unable to pay it, I have to be ready to prove it with facts and figures right off our books" (G.C. Ex. 2(b), p. 86).

At the next meeting, December 18, 1963, Union Representative Rail requested that the Company's books be "open to our auditor," and this matter was discussed at some length (R. 39; G.C. Ex. 2(c), pp. 93-94, *et seq.*). At the next meeting on January 13, 1964, Mrs. Selvin submitted to the Union a copy of the Company's profit and loss "figures" for the calendar years 1961, 1962, and the first ten months of 1963 (R. 39; G.C. Ex. 4).[2] At this meeting, Mrs. Selvin, commenting on the Union's request that these reports be audited, said that the purpose of such an audit would be "to check that I have given you correct figures and it is limited to that." (G.C. Ex. 2(d), p. 276). A further meeting of the parties was held the following day, January 14 (G.C. Ex. 2(e)).

On January 17, 1964, Alfred Klein, attorney for the Union, wrote to Mrs. Selvin as follows (R. 40; G.C. Ex. 3(a)):

> In our opinion, and under the Board authorities, your summary of financial items is insufficient to enable the union to meet its obligation of bargain-

[2] The information supplied by the Company on this occasion is reproduced in the Trial Examiner's report (R. 39).

ing in good faith. Substantiating information and data of the general headings are hereby requested, and particularly of those figures set forth under the following main listings for the three years indicated:

Net sales—less sales discounts
Factory and Shipping Wages
Other Salaries and Wages
Materials, Supplies, Expenses
Advertising and Commissions
Financial Expenses, Interest, Factoring
Depreciation

Request is, accordingly, made that an audit or a detailed accounting of these items be forthwith furnished and toward that end, the union is agreeable to designating a certified public accountant to obtain the same on your premises with direct instructions to keep the information confidential from third parties, competitors and the like.

In a reply letter of February 12, 1964, Mrs. Selvin set forth the conditions under which the Company would allow an inspection of its financial and related records, as follows (R. 40-41; G. C. Ex. 3(d):

Let us get the matter of an audit of the Company's records defined:

As I understand it the Union was not satisfied with the information submitted in support of the Company's claim that its financial situation does not justify additional cost items at this time and demanded further proof of the matter. I have,

heretofor [sic], submitted profit and loss statements for three successive years. Also I submitted figures outlining cost of the Union's demands and showing conclusively that these demands could not possibly be met on the Company's present volume of business. I have made the following offer to prove our position:

1. The books and records may be examined in our office.

2. Such examination to be made by a Certified Public Accountant chosen by the Union and approved by the Company.

3. All costs of such examination to be borne by the Union.

4. Such accountant work directly with the Company's accountant who will make available to him the Company's records and give him necessary information pertinent to such records and allow him to examine them to the extent [the accountant chosen by the Union] deems necessary.

5. The accountant chosen by the Union to supply the Union only with the information as to whether or not the company's representations (already submitted to the Union) are true, and that the accountant be specifically instructed that the details of the Company's financial records are not to be disclosed to any third parties whatsoever, including the Union.

If we can agree to these conditions then we are ready to allow an approved accountant to proceed at once with the examination of our records.

In a letter dated February 14, 1964, Mr. Klein agreed to all Mrs. Selvin's conditions, save non-disclosure of details to the Union (R. 41; G. C. Ex. 3(e)). Mrs. Selvin answered by letter dated February 15, 1964, in which she asserted her belief that the Union intended to use information obtained from the Company's books in an effort to bargain about supervisory salaries. She restated the Company's position as follows (R. 42; G. C. Ex. 3(e)):

> I have now offered *only proof* that the Profit and Loss Statement as I presented it, is a true and correct Profit and Loss Statement. Our books will reflect this. Your accountant will be free to determine the particulars which add up to the Profit and Loss figures which we give to the Union but we must insist that he do not divulge these particulars to the Union.

Mr. Klein for the Union answered by letter of February 19, 1964, in part as follows (R. 42-43; G. C. Ex. 3(g)):

> I can certainly agree with you that the audit will only be used for that purpose and for none other. I fully agree with you that the union cannot negotiate as to the expenditures you have made nor the salaries you are paying supervisors and management employees. On the other hand, we believe it is within their prerogative to comment upon a relationship which salaries to unit workers should bear to salaries of white collar workers. Also, I believe they certainly can comment upon whether the failure to show a satisfactory operating state-

ment is due to a deliberate bleeding of the assets by officers and/or controlling stockholders. For example, if a corporation has a net income of $100,000.00 and is paying a president a $1,000,000.-00 salary, I am positive the right of any person to argue that the corporation was being bled for that one salary is evident, even though that person cannot negotiate the president's salary.

I, therefore, agree with you that your company is not required to negotiate the remuneration of the executives and supervisors with the union, although to repeat, this information may well be necessary for the union to bargain in good faith even though it be kept strictly confidential. I further agree with you that no further use of such details can or should be made by the union.

Mrs. Selvin answered for the Company by letter of February 29, 1964, as follows (R. 43-44; G. C. Ex. 3(h)):

Replying to your letter of February 19 concerning the matter of a certified public accountant checking the figures of Metlox Manufacturing Co. which were submitted to Mr. Rail in the bargaining conference of January 13, 1964, and which have been the subject of considerable correspondence between us.

It is the Company's position (and on this position we will rest our case) that the Union is entitled *only to figures necessary to the bargaining.* We have taken the position that the Company is financially unable to grant the increases which the

Union demanded and we have offered proof of the figures we submitted, which included the Company's Profit and Loss Statements for the years 1961, 1962 and 1963 November 30 (which was the latest date available at the time of submission). We believe our obligation is covered by our offer to prove that our submission was true.

Our offer is set forth at length in our letter of February 12, 1964, and, since you claimed not to understand it completely, I clarified the matter in a further letter to you on February 15, 1964.

This offers the Union full opportunity to substantiate our claim. We stand on our right *not to have the details of the various classifications of expense, other than that pertaining to the factory and shipping employees,* made available to the Union for any purpose. It cannot possibly have any relativity to bargaining since the classifications which we will give your accountant an opportunity to check so that he is able to inform the Union whether our representations as to our financial position are true or false, are not negotiable matters, as you have yourself admitted in your letter of February 19.

Needless to say, we recognize that the Union is entitled to any specific information pertaining to the employees in the bargaining unit and to that extent we will give your certified public accountant permission to make such figures available to the Union which are applicable directly to the bargaining unit.

I have submitted the name of Steres, Alpert & Company, Certified Public Accountants, 6404 Wiltshire Boulevard, as having been designated by the Union to undertake this investigation. The Company has no objection to this firm of accountants representing the Union in this matter.

When and if we can come to an agreement as to the extent of the material to be made available to the Union by the accountant, we are ready to proceed and the investigation can commence at once. We will, of course, insist that our full understanding shall be set forth in writing.

C. *The strike*

During contract negotiations, the Union held periodic meetings to make progress reports to the employees (R. 48; Tr. 156-157, 169). The employees were told of the Company's claim of inability to meet any demands which would cost the Company more money, and that a request had been made to examine the Company's books (R. 48; Tr. 154-157). At a union meeting on February 20, 1964, Union Representative Rail told the employees "that he had requested that the Company's books be opened in order for us to determine whether we could receive a wage increase and he said he apparently was not making very much headway and if there was no decision reached on it he would be forced to file refusal-to-bargain charges" (R. 48; Tr. 160, 157-158). On March 4, Rail told the membership that the Company had supplied a profit and loss statement, but that it was "not enough material for us to use" (R. 48; Tr. 162-163, 160). The members were

informed that an unfair labor practice charge had been filed with the Board. The possibility of a strike was also discussed (R. 48; Tr. 161). At the next meeting on March 11, a strike vote was taken and 72 employees favored a strike, while 8 were opposed (R. 48; Tr. 163). However, no strike date was fixed. On April 1, Rail reported to the membership that no progress was being made in negotiations and stated his view that apparently the only alternative was to strike (R. 48; Tr. 166). By unanimous vote, the employees voted to strike (*ibid.*). The following morning, April 2, another meeting was held. Since attendance at this meeting was larger than the day before, Rail explained again why he thought it was necessary to strike (R. 48; Tr. 166-167). The strike commenced that day and was still in progress at the time of the hearing in this case on November 18 and 19, 1964 (R. 48; Tr. 168).

II. The Board's Conclusions and Order

The Board concluded that the Company refused to bargain in good faith with the Union, thereby violating Section 8(a)(5) and (1) of the Act, by unduly restricting the Union's examination of its financial and other records in an effort to inquire into, and substantiate the Company's claimed inability to pay a wage increase or grant other economic benefits to its employees.[3] The

[3] Since the Board's finding is that the Company's conduct following execution of the settlement agreement and its approval by the Regional Director on October 29, 1963, amounted to a refusal to bargain, the Board went behind the settlement agreement and considered the Company's conduct prior thereto. The Board thus found that the Company also unlawfully refused to bargain with the Union from June 13, 1963 to October 29, 1963 (R. 48). See *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248, 253-254. The Company does not contest this latter finding (Co. br., p. 2).

Board further found that the strike commencing April 2, 1963, was caused by the Company's refusal to bargain in good faith with the Union.

The Board ordered the Company to cease and desist from refusing to bargain in good faith with the Union, and from interfering in any manner with the efforts of the Union to bargain collectively for all employees in the appropriate unit. Affirmatively, the Company was ordered to bargain collectively with the Union upon request; upon application to reinstate the striking employees to their former or substantially equivalent positions; to make them whole for any loss of earnings resulting from a failure to reinstate; and to post appropriate notices.

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(5) and (1) of the Act by Refusing the Union Access to Data Relevant to Substantiation of the Company's Claimed Inability to Grant a Wage Increase or Other Economic Benefits.

It is well settled that when an employer claims financial inability to grant a demanded wage increase or other economic benefits, he must attempt in good faith to substantiate that claim when he is requested by his employees' bargaining representative. *N.L.R.B* v. *Truitt Manufacturing Co.,* 351 U.S. 149; *N.L.R.B* v. *Western Wirebound Box Company,* 356 F. 2d 88 (C.A. 9); *N.L.R.B* v. *Feed and Supply Center,* 294 F. 2d 650 (C.A. 9); *N.L.R.B.* v. *Jacobs Manufacturing Co.,* 196 F. 2d 680, 682-684 (C.A. 2); *N.L.R.B.* v. *Celotex Corp,* No. 21994, decided June 28, 1966, 62 LRRM 2475 (C.A. 5). The ultimate inquiry is simply whether, on the

facts of the particular case, the employer has met his statutory duty to bargain in good faith. "What degree of cooperation is to be required, under any particular set of circumstances, from the parties at the bargaining table, is largely a matter for the Board's expertise." *Fruit & Vegetable Packers and Warehousemen, Local 760* v. *N.L.R.B.*, 316 F. 2d 389, 390-391 (C.A. D.C.); see also *N.L.R.B.* v. *Celotex Corp., supra* 62 LRRM at 2477. Here the Board in affirming the carefully reasoned decision of the Trial Examiner, "acted within its allowable discretion in finding that under the circumstances of this case" the Company's refusal to provide the information sought by the Union constituted an unfair labor practice. *N.L.R.B.* v. *Woolworth Co.*, 352 U.S. 938, reversing, 235 F. 2d 319 (C.A. 9).

In its brief to the Court, the Company succinctly summarizes the conditions under which it was willing to let the Union examine its books (Co., br., p. 8):

> (1) The examination to be in the Company's office; (2) by a Certified Public Accountant chosen by the Union and approved by the Company; (3) with the cost borne by the Union; and (4) with the details of the Company's financial records not to be disclosed to any third parties, including the Union, except to advise the Union whether the Company's profit and loss statements were true.

The principal issue before the Court is whether the Board was reasonable in finding, as it did, that the fourth condition imposed by the Company was unduly restrictive and inconsistent with the Company's obli-

gation to deal on open and frank terms with the Union. In short, the inquiry is whether the Company, by imposing the fourth condition, failed to comply with the standard of good faith required by the Act.

The Company's fourth condition had a two-fold effect: first, it blocked free communication between the Union and any certified public accountant it employed, thereby interfering with the agency relationship; and second, it prevented the Union from obtaining the information it felt it needed to evaluate the Company's claimed inability to pay, namely, whether the profit and loss statements gave a true picture of the Company's financial condition. Even if, after examining the Company's financial records, the accountant had concluded that the Company's inability-to-pay plea was not justified because the profit and loss statements did not accurately reflect the Company's financial condition, under the Company's restriction he would have been prevented from informing the Union of this fact, since he was limited to informing the Union whether the profit and loss statements were true.

The Trial Examiner, in his decision, as affirmed by the Board, took pains to point out that the result reached here was not intended to sanction a union "fishing expedition in a search for items on which to make efficiency recommendations or for flaws in managerial judgment" (R. 45). Obviously, the Company does not have to negotiate or conduct discussions with the Union about matters which are outside the scope of mandatory bargaining as defined in the Act.[4] How-

[4] Section 8(d) of the Act defines the bargaining obligation as that of meeting at reasonable times and conferring in good faith "with

ever, as we have seen, here the Company, when it claimed inability to pay increased wages, made this issue "highly relevant" to the negotiations. *N.L.R.B.* v. *Truitt Mfg. Co., supra,* 351 U.S. at 152. As the Supreme Court pointed out in the *Truitt* case (*id.* at 152-153):

> The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions.
>
> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. [Citations and footnotes omitted.]

Proof of the accuracy of the Company's claim of inability to pay a wage increase, as the Board found here, was not provided by the profit and loss statements which the Company furnished. The Board's conclusion in this regard was fortified in part by the testimony of Certified Public Accountant Leon C. Steres, whom the Board deemed qualified as an expert witness

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respect to wages, hours and other terms and conditions of employment." See *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-350, where the Supreme Court delineated the scope of mandatory bargaining.

in the field of accounting and auditing (R. 45). Mr. Steres, in addition to an impressive career as a public accountant, has taught various accounting courses over a period of many years at the University of California in Los Angeles (Tr. 43-45). As Mr. Steres indicated, a profit and loss statement is only one factor to consider in arriving at a judgment or opinion as to the financial soundness of a company (R. 45; Tr. 67-69).[5] In order to analyze such a statement, or to ascertain the financial condition of a company, more information may well be required, such as knowledge about the accounting method used and whether there has been any recent change in method; whether the company has experienced unusual or non-recurring expenses; the manner in which depreciation is handled by the company; the way in which non-operational items are treated for accounting purposes; how inventories are evaluated; how maintenance expenses are accounted for, either on a current basis or capitalized and spread over their useful life. The same question can be asked with respect to expenses for purchases of materials and research and development costs, that is, whether

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[5] "An accounting statement . . . in the absence of evidence tending to prove that it correctly reflects the effect of reported transactions . . . is merely a piece of paper." Hills, *Law of Accounting I*, 54 Col L. Rev. 1; see also opinion of Justice Jackson, *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 643, n. 40, "As a representation of the condition and trend of a business, [accounting] uses symbols of certainty to express values that actually are in constant flux . . . If one cannot rely on accountancy accurately to disclose past or current conditions of business, the fallacy of using it as a sole guide to future price policy ought to be apparent." And see Barkin, *Financial Statements in Collective Bargaining*, 4 Labor Law Journal 753.

they are treated as current expenses or on a capitalized basis (R. 46; Tr. 67-69, 71, 77, 79-80, 83-84, 86-92, 98, 103-105, 115-116). The answers to these various questions, as the Board pointed out in its decision, would not entitle the Union in this case to bargain about questions which are matters of management and direction of the Company, but would only supply it with substantiation that the figures of profit and loss supplied by the Company, in addition to being accurate, constitute fair representations of the Company's financial condition (R. 46-47).

There is no dispute here as to the correctness of the Company's contention that the Union is not entitled to use information obtained from the Company's financial records for the purpose of bargaining about the "efficiency of management" or whether there are any "deadheads" on the office payroll (Co. br., pp. 12, 14). Union Attorney Klein, in his letter to the Company dated February 19, 1964, conceded that "the union cannot negotiate as to the expenditures you have made nor the salaries you are paying supervisors and management employees" (G.C. Ex. 3(g)). The Company also properly quotes language from the opinion in *N.L.R.B.* v. *Jacobs Mfg. Co.,* 196 F. 2d 680, 684, (C.A. 2), standing for the same proposition. Indeed, as we pointed out *supra,* a union has no right to demand negotiations on any subject outside the scope of mandatory bargaining as prescribed by the Act. But to say that the duty to bargain does not extend to matters of business decision or managerial prerogative is not to say that the Union may be denied access to informa-

tion concerning such matters if the information is requested and is *relevant* to the collective bargaining relationship.

An argument similar to that made by the Company here was made by the employer in *Curtiss-Wright Corp.* v. *N.L.R.B.,* 347 F. 2d 61 (C.A. 3). There the Union, for purposes of bargaining and processing grievances for employees within a bargaining unit of salaried office, clerical and engineering employees asked for detailed information, including *inter alia,* job evaluation factors and wage rates for a large class of administrative employees outside the bargaining unit. The Union's particular concern was with the fact that the bargaining unit was being gradually reduced in size, while the administrative group was growing. The Union believed that employees classified as administrative were doing work which actually should have been allocated to those in the bargaining unit. The Court affirmed the Board's finding that the employer's refusal to furnish the requested information was in violation of Section 8(a)(5), noting that the information was relevant because it would assist the Union in determining the best contract provisions to request at the bargaining table and what relief it could seek through the prosecution of grievances, 347 F. 2d at 69-70. In answering the employer's contention that it was not required to furnish information about the employees outside the bargaining unit *because bargaining as to them was not mandatory,* the Court stated (347 F. 2d at 70):

> It is well within the responsibility of the Union in the instant case in executing its duty to protect the

> interests of the employees in the bargaining unit it represents to closely scrutinize all facets relating to any encroachment upon the rights of those unit employees to the end that a stable employment structure for the members of the bargaining unit may be maintained.

The key question in deciding cases of this type, therefore, as the Third Circuit recognized in the *Curtiss-Wright* case is not whether the requested information relates to matters that are within the ambit of managerial decision, but whether "the requested data is relevant and, therefore reasonably necessary, to a union's role as bargaining agent . . . ." 347 F. 2d at 68. Accord: *Sylvania Electric Products, Inc.* v. *N.L.R.B.,* 358 F. 2d 591, 592-593 (C.A. 1), petition for certiorari pending; *Hollywood Brands* v. *N.L.R.B.,* 324 F. 2d 956 (C.A. 5), enforcing 142 NLRB 304, 305, cert. denied, 377 U.S. 923; *International Telephone and Telegraph Corp.,* decided June 29, 1966, 159 NLRB No. 145, 62 LRRM 1339, 1342. As we have seen, the information requested by the Union in the instant case, and which the Company refused to provide, fully satisfied the criterion of relevancy. The profit and loss statements furnished by the Company did not disclose sufficient information from which a fair judgment could be made as to the validity of the Company's claim of inability to pay a wage increase. C.P.A. Steres, a recognized expert in accounting matters, confirmed this view. Accordingly, the additional information sought by the Union was manifestly relevant to the negotiations.

Respondent has mistakenly cited as justification for its position in this proceeding the Board's decision in *Yakima Frozen Foods,* 130 NLRB 1269, remanded on other grounds *sub nom, Fruit and Vegetable Packers and Warehousemen Local 760* v. *N.L.R.B.,* 316 F. 2d 389 (C. A. D.C.). That case is fully distinguishable from the one at bar, because there, unlike the instant situation, the employer did not impose a barrier to communication between the C.P.A. auditor and the Union. The employer there was willing to submit his books and records to an audit in substantiation of the balance sheet which he had offered to the Union, and although he refused to permit union agents, as such, to be present during the audit, the C.P.A. was not limited as to what he could tell the union concerning the results of his audit.[6] That case stands in marked contrast to the instant one, since here the Company would not permit the Union access to any of the information to which it was entitled by way of substantiating the profit and loss statements which had been submitted. *Albany Garage, Inc.,* 126 NLRB 417, also relied on by the Company (br., p. 14), is likewise distinguishable on its facts from the case at bar. There the Union had not objected in previous years to financial data of the type furnished by the employer; the employer's claim of inability to grant a wage increase was based in part on a prediction of business conditions in the industry; and the employer offered to include a six-

[6] The only item of information which the employer in *Yakima Frozen Foods* regarded as confidential and which he restricted the auditor from transmitting to the Union concerned his sources of supply and the consignees of his products; he was concerned about the possibility of secondary boycotts. 130 NLRB 1271, n. 2.

month wage reopener in a new contract in order to permit an early review of wages and to determine if conditions at that time justified an increase. 126 NLRB at 418. In the light of all the circumstances presented in that case the Board merely held that the employer had fulfilled its obligation to bargain in good faith. The Board, in the exercise of its statutory authority, has concluded to the contrary here.[7]

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Strike Which Began April 2, 1964, Was Caused by the Company's Unfair Labor Practices.

As shown in the Counterstatement, the Union was certified on June 11, 1963, but petitioner refused to bargain until after unfair labor practice charges had been filed with the Board. The basis of the settlement reached on October 29, 1963, was petitioner's agreement to bargain in good faith in the future. It was against this background that Union Representative Rail reported at a union meeting on February 20, 1964, that if the Company continued in its refusal to substantiate its claimed inability to pay a wage increase, additional unfair labor practice charges would be filed. On March 4, Rail told the membership that in his opinion the profit and loss statement submitted by the Company was not enough information and therefore he had filed a refusal-to-bargain charge. On April 1, Rail reported no further progress and advised that a

[7] *Tennessee Chair Company,* 126 NLRB 1357, cited by the Company (br., p. 14) does not support its position at all. The Board there found that the employer violated Section 8(a)(5) by refusing to furnish financial data to substantiate a claimed inability to pay a wage increase.

strike appeared to be the Union's only alternative. The members voted unanimously to strike. The morning of April 2, at another meeting, Rail listed again for the members the reasons that he felt necessitated the strike—stalling tactics, refusal to bargain, unfair labor practices and the Company's "complete ignoring the Union" (Tr. 167). The strike commenced that day, and was still in progress seven months later when the hearing was held in this case.

On the basis of the evidence, there can be no question but that the strike was the result of the Company's breach of the settlement agreement and its continuing refusal to bargain in good faith. The Company's unwillingness to supply the financial information sought by the Union was discussed many times by the employees prior to the strike, and the Company ignores the record completely when it suggests in its brief (pp. 9-10, 17-18) that the Company's refusal to furnish the data and the lack of good faith which the Company's attitude demonstrated did not motivate the strike action. That the employees' basic objective throughout this period was to obtain improved economic benefits from the Company does not detract from the validity of the Board's conclusion that the work stoppage was an unfair labor practice strike. Even though "other reasons were also present," it is enough to show that it was an unfair labor practice strike if "one of the reasons for it was to protest an unfair labor practice." *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 907 (C.A. 9), and cases cited; see also *N.L.R.B.* v. *Fitzgerald Mills Corp.,* 313 F. 2d 260, 269 (C.A. 2), cert. denied 375 U.S. 834; *General Drivers and Helpers*

Union, Local 662 v. *N.L.R.B.,* 302 F. 2d 908, 911 (C.A. D.C.), cert. denied, 371 U.S. 827; *Northern Virginia Steel Corp.* v. *N.L.R.B.,* 300 F. 2d 168, 174-175 (C.A. 4).

The Company attempts to argue that the strike would have occurred even if it had not been for its unfair labor practices (Co. br., pp. 16-17). This argument is without merit, however, and completely without support in the record. As the cases cited by the Company (br., p. 16) indicate, the burden rests on the employer making such an argument "to show that the strike would have taken place even if he had not refused to bargain." *N.L.R.B.* v. *Barrett Co.,* 135 F. 2d 959, 962 (C.A. 7). This the Company "has not done and this we believe it cannot do." *N.L.R.B.* v. *Stackpole Carbon Co.,* 105 F. 2d 167, 176 (C.A. 3), cert. denied 308 U.S. 605. Equally misplaced is the Company's reliance on *Scott* v. *Scott,* 245 F. 2d 926 (C.A. 9). That case merely holds that in order to be characterized as an unfair labor practice strike, substantial evidence must show a causal connection between any unfair labor practice and the subsequent strike. We have shown *supra* that substantial evidence fully supports the Board's finding that the strike in the instant case was caused by the Company's failure to bargain in good faith.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for review should be denied and the Board's order should be enforced in full.

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September 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good

faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any argeement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

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